UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-2540

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

HARDING GLASS COMPANY, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF A SUPPLEMENTAL ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the application of the National Labor Relations Board ("the Board") to enforce its order against Harding Glass Company, Inc. ("the Company"). The Board had subject matter jurisdiction over the underlying unfair labor practice proceeding pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The

Board's order is a final order under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction under Section 10(e) of the Act because the underlying unfair labor practices occurred in Worcester, Massachusetts. The Board's Supplemental Decision and Order issued on August 29, 2006, and is reported at 347 NLRB No. 102. (D&O 1-28.)[1] The Board filed its application for enforcement on October 31, 2006. That filing was timely because the Act places no time limitation on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined the amounts of backpay due employees for the loss of earnings they suffered because of the Company's unlawful unilateral changes to their terms and conditions of employment.

STATEMENT OF THE CASE

Briefly, on March 31, 1995, the Board found that the Company unilaterally implemented changes in the employees' terms and conditions of employment without bargaining with the Union. Among other things, the Board ordered that employees be made whole and that the Company restore the *status quo* as it existed before its unfair labor practices. This Court enforced the Board's order, in relevant part.

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[1] "A." refers to the pages of the joint appendix that was filed with the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Following Court enforcement, the Board instituted compliance proceedings. In the course of those proceedings, the Regional Director moved to strike certain portions of the Company's answer to the compliance specification and for partial summary judgment. The Board granted the Regional Director's motion in most respects and remanded the case; the Company petitioned this Court for review of that order. This Court dismissed the Company's petition, holding that it lacked jurisdiction to review a Board order that was not final.

Upon remand of the case to the Board, compliance proceedings resumed and a hearing was held before an administrative law judge, who granted the remedy requested in the compliance specification. The Company filed exceptions to the administrative law judge's decision. In a second Supplemental Decision and Order, the Board overruled the Company's exceptions and adopted the judge's recommended decision and order. This case is before the Court on the Board's application for enforcement of its Supplemental Decision and Order.

STATEMENT OF FACTS

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

The Company sells and installs glass for automobiles and commercial and industrial buildings in Worcester, Massachusetts. In October 1993, the Company employed five employees. Three of those employees were classified as glassworkers, and two were classified as glaziers. The glassworkers repaired and

replaced automobile glass, while the glaziers repaired and installed industrial and commercial glass. Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL-CIO ("the Union") had long represented both classifications of the Company's employees in separate units. (D&O 988.)[2]

Shortly before expiration of the then-current collective-bargaining agreement on October 16, 1993, the parties, at the Company's request, entered into negotiations for a successor agreement. During the course of those negotiations, which consisted of three meetings, the Company proposed, among other things, to reduce the glaziers' pay rate from $22.05 to $13.73 per hour, while raising the glassworkers hourly pay rate by 50 cents to $13.73 per hour. (D&O 988-89.) In addition, the Company proposed eliminating all contributions to the Union's health, welfare, pension, and annuity funds, replacing the health fund only with another insurance plan. The Union rejected the Company's offer and counterproposed maintaining current wages but allowing employees to perform more glazier work. The Company, however, rejected the Union's counterproposal. On October 17, the Company's glaziers voted to reject the Company's offer and strike. They

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[2] "D&O" refers to the Board's Decision and Order as enforced by this Court and reported at 316 NLRB 985 (1995), *enforced in relevant part*, 80 F.3d 7 (1st Cir. 1996). Because it was not included in the joint appendix that the Company filed with this Court, it has been appended to the end of this brief.

established a picket line the following day, and the Company's glassworkers initially respected that picket line. (D&O 990.)

Notwithstanding the strike and picketing, the parties met again but without reaching an agreement. On October 23, the Company, after only three bargaining sessions totalling no more than three hours, implemented its final offer. The Company then, while threatening to replace them, offered the glassworkers the proposed wage and benefit package that the Company had offered to the Union. On October 25, the three glassworkers resigned from the Union and returned to work for the Company. Meanwhile, the glaziers maintained their picket line, and the Company hired replacement glaziers under the new terms and conditions of employment, as well. (D&O 990.)

As relevant here, the Board found that the Company unilaterally implemented new terms and conditions of employment without bargaining to impasse with the Union. It ordered the Company to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and make whole both striking and replacement employees for any losses they may have suffered as a result of the unilateral changes in employment terms, with interest.

This Court enforced that, as well as other, portions of the Board's order.[3] (D&O 986-87.)

II. THE BOARD'S 2002 SUPPLEMENTAL DECISION AND ORDER

After issuance of the Court's mandate in the underlying unfair labor practice proceeding, the Regional Director issued a compliance specification, setting forth the methodology of calculation and amounts due 10 named employees and their union pension and welfare funds because of the Company's unlawful changes in compensation rates. The Regional Director subsequently issued an amended specification and scheduled a hearing on the specification for June 28, 2000. The Company filed answers to both. (A. 6-45.)

By certified letter dated March 10, 2000, the Region's compliance officer advised company counsel that, essentially due to a lack of specificity, the Company's answer to the amended compliance specification was "inadequate" under the terms of Section 102.56(b) of the Board's Rules and Regulations.[4] The letter further informed the Company that the Regional Office would move for

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[3] The Court declined to enforce that portion of the Board's order relating to the conversion of the strike from an economic to an unfair labor practice strike on October 25, 1993. As a result, the striking employees did not become entitled to immediate and full reinstatement to their former positions upon their offer to return to work.

[4] Section 102.56 (b) of the Board's Rules and Regulations requires respondents to "specifically admit, deny, or explain each and every allegation of

partial summary judgment if the Company did not file a compliant amended answer by March 20, 2000. The Company filed an amended answer on March 21, 2000. (A. 46-73.)

Finding the Company's amended answer remained deficient, the Region, on May 19, 2000, filed with the Board a motion to strike portions of the Company's amended answer and for partial summary judgment. On May 23, 2000, the Board issued an order and Notice to Show Cause, transferring the proceeding to itself and postponing indefinitely the previously scheduled hearing. The Company filed an opposition to the motion to strike. (A. 74-95.)

On August 1, 2002, the Board issued a Supplemental Decision and Order that, with one exception, granted the Regional Office's motion to strike and for partial summary judgment. Specifically, acting pursuant to Sections 102.56(b) and (c) of its Rules and Regulations, the Board granted the motion to strike the Company's answers to paragraphs 1 through 10, and 12 through 21, agreeing with the Region that the Company, among other things, failed to provide specific, supporting figures or information for its assertions disputing the allegations made in the corresponding paragraphs of the compliance specification. Accordingly, the

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the specification, unless the respondent is without knowledge[] . . ., a general denial shall not suffice."

Board granted the Region's motion for partial summary judgment as to those paragraphs of the specification. (A. 107-10.)

In addition, the Board granted the Region's motion to strike the Company's affirmative defenses. The Board found that the Company was not legally entitled to claim that the Regional Office's delay in issuing compliance specifications relieved it of backpay obligations or that its liability for unpaid contributions to the Union's benefit funds should be mitigated by payments it made to an alternative employee health plan. However, the Board denied the motion for partial summary judgment as it applied to former striker James Tritone and found that the Company was entitled to litigate the issue of whether Tritone was reinstated as a glazier or as a glassworker. Accordingly, the Board remanded that and other issues not resolved by partial summary judgment to an administrative law judge for a hearing thereon. (A. 107-10.)

Notwithstanding the Board's decision to remand the case, the Company petitioned this Court for review of the Board's August 1, 2002 Supplemental Decision and Order. The Board filed a motion to dismiss the Company's petition. On November 25, 2002, this Court dismissed the Company's petition, agreeing that it lacked the jurisdiction to consider it because the Board had yet to issue a final order. (A. 111-17.)

III. THE BOARD'S 2006 SUPPLEMENTAL DECISION AND ORDER

On December 22, 2004, the Regional Director issued a second amended compliance specification, followed by a third amended compliance specification based on updated information. The Company filed answers thereto and the matter was scheduled for a hearing before an administrative law judge. (A. 143-376.)

Prior to the hearing, the Regional Director filed a motion in limine with the administrative law judge to prohibit the Company from raising matters that had previously been determined in the underlying unfair labor practice proceeding--such as that no impasse was reached in prior negotiations--or matters other than those specifically remanded for hearing in the Board's ruling on the motion to strike and for partial summary judgment. The Company filed an opposition to the Director's motion. The administrative law judge granted the motion in limine. (A. 119-22, 132-38, 436-53.)

Based on the allegations in the compliance specification and supporting evidence submitted at the hearing, the administrative law judge agreed with the Regional Director’s calculation of backpay for the individual employees and of monies due the Union’s funds. He found that the backpay period commenced on October 25, 1993, for returning strikers. The backpay period for replacement workers began on June 5, 1996, when the Company came under a duty to bargain

about their terms and conditions of employment at the end of the strike.[5] Replacements hired after that date were entitled to backpay from their date of hire, if the Company failed to apply the preexisting contractual terms and conditions of employment to them. For all employees, the backpay period terminated on January 21, 2003, when the Union disclaimed interest in representing employees in the units. (A. 243-360.)

Gross backpay was calculated by applying the wage and benefit rates in the expired collective-bargaining agreement to the hours worked by employees during the backpay period on a quarterly basis. Although not obligated to do so, the Regional Director derived a net backpay amount for each employee by deducting from gross backpay his interim earnings—which, in every case, was derived from the employee's actual employment with the Company during the backpay period. The administrative law judge found that the determinations made by the Regional Director were reasonable and accordingly adopted them. (A. 601-06.)

In addition, the administrative law judge found that former striker Tritone, who returned to work in March, 1994, worked as a glazier before and after his return to work. Thus, the judge concluded that Tritone was entitled to the pay and

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[5] *See Detroit Newspaper Agency,* 327 NLRB 871, 872 (1999) (internal citation omitted) (replacements "assume the same status as other unit employees and their employment terms become governed by the" same terms and conditions of employment applicable to other unit employees upon the conclusion of the strike), *enforcement denied on other grounds*, 216 F.3d 109 (D.C. Cir. 2000).

benefits of that position provided for in the expired collective-bargaining agreement for the 3 weeks he worked for the Company during the backpay period. (A. 601-06.)

The Company filed exceptions to the administrative law judge's supplemental decision and recommended order. The Board considered those exceptions, overruled them, and adopted the recommended order, directing the Company to pay specified amounts, plus interest to the named unit employees and to the Union's funds. (A. 593-606.)

SUMMARY OF ARGUMENT

The Board reasonably determined the amounts of backpay due the employees because of the employer's unfair labor practices. Given the presumption that some backpay was owed the employees because of the employer's unfair labor practices, the General Counsel's burden was merely to show the gross amount of backpay due. The General Counsel made that showing and the Company does not dispute the general backpay formula applied.

Rather, the Company argues that: (1) replacements were not entitled to any backpay, assertedly because the strike did not end at any time before the Union's disclaimer of interest; (2) employee Tritone was not entitled to backpay as a glazier; and (3) the Board's striking parts of the Company's answer and granting summary judgment against it regarding certain allegations of the compliance

specification, as well as the delay in resolving this case, warrant denial of the Board's supplemental order altogether. Each of the Company's contentions lacks merit.

The Company's argument regarding the commencement of backpay for replacement employees is readily disposed of. Substantial evidence supports the Board's finding that the Union gave notice of the strike's termination on June 4, 1996. By letter of that date, the Union notified the Company that the strike had ceased. The Company claims that the Union's letter was insufficient notice because a single employee did not personally inform the Company of his abandonment of the strike. That argument ignores, however, that a union can waive the employees' right to strike.

Similarly, there is no merit to the Company's claim that Tritone was not entitled to backpay as a glazier. The Company contends that Tritone could not perform glazier work following the strike because of an injury. However, it is undisputed that, despite his prestrike injury, Tritone returned to work as a glazier before the strike and performed glazier duties until he went on strike. The collective-bargaining agreement, as well as the Company's posted policies also refute the Company's claim to the contrary. Based on those facts, the Board found that Tritone was entitled to his former position as a glazier and the corresponding pay rate.

The Company's procedural arguments are also without merit. In particular, the Company is not permitted to present to this Court its claim that it was denied due process by the Board's decision to strike portions of its answer beyond that sought by the Regional Director. The Company never presented this argument directly to the Board in a motion for reconsideration, a special appeal, or in exceptions to the administrative law judge's recommended supplemental decision and order. In any event, even considering the merits of the Company's claim, the Board possessed both the authority and the good reason to determine that the Company's vague answers to the compliance specification did not warrant a hearing.

As to the portions of the Board's decision on the motion to strike that the Company did preserve for review, its challenges fare no better. To begin, the Board properly found insufficient the Company's mere denial that two employees should be classified as glassworkers for backpay purposes, given that the Company did not state--and has never stated--what the employee's classification should be, if not glassworker. Also meritless is the Company's claim that remitting unpaid monies to the employees' union health and retirement funds would be a "windfall" for the funds not benefiting employees upon whom the Company imposed a substitute health insurance plan. The Board reasonably rejected the Company's claim as inconsistent with Board and judicial precedent, and, in any event, the

Company's answer failed to allege any information indicating that the fund payments would be punitively duplicative.

Finally, under well settled law, the Board was not required to visit the consequences of its own delay on the victims of the Company's unfair labor practices.

ARGUMENT

THE BOARD REASONABLY DETERMINED THE AMOUNTS OF BACKPAY DUE EMPLOYEES FOR THE LOSS OF EARNINGS THEY SUFFERED BECAUSE OF THE COMPANY'S UNLAWFUL UNILATERAL CHANGES TO THEIR TERMS AND CONDITIONS OF EMPLOYMENT

As shown above (pp. 9-10), due to the nature of the underlying violation, the calculation of backpay was straightforward. That is, relying on the Company's payroll records, the Regional Director derived gross backpay figures by applying contractual wage and benefit terms to the hours worked by returning strikers and replacement employees. From those gross backpay amounts, the Regional Director subtracted the employee's interim earnings--which also were derived directly from the Company's payroll records because the employees worked for the Company during the backpay period--to compute net backpay.

Before this Court, the Company does not contest the reasonableness of the backpay formula. Rather, it contends that substantial evidence does not support the Board's determination that the strike terminated on June 4, 1996, and that the replacements' backpay period began on June 5, 1996. Further, the Company challenges the backpay award to employee Tritone, disputing his classification as a glazier. Finally, it argues that procedural rulings that the Board made against the Company on the motion to strike, as well as the delay in resolving this case, warrant the denial of backpay altogether. As shown below, however, none of the

Company's asserted defenses has merit, and the Court should enforce the Board's order.

A. Applicable Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to fashion appropriate remedial orders to alleviate the effects of unfair labor practices. That section provides: "[U]pon finding that an employer has committed an unfair labor practice" the Board may direct the violator "to take such affirmative action . . . as will effectuate the policies of the Act." *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-899 (1984); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's discretion extends to the determination that a backpay remedy is appropriate as well as to the computation of the backpay amount. *See Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *Master Iron Craft Corp.*, 289 NLRB 1087, 1087 (1988), *enforced*, 898 F.2d 138 (2d Cir. 1990).

As the Second Circuit has observed, the "finding of an unfair labor practice is presumptive proof that some backpay is owed." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965). A backpay remedy under the Act is designed to restore "the economic status quo that would have obtained, but for the illegal [conduct]." *Phelps Dodge*, 313 U.S. at 194. *Accord NLRB v. J. H. Rutter Rex Mfg. Co*., 396 U.S. 258, 265 (1969); *Mastro Plastics Corp.*, 354 F.2d at 175.

Restoration of the status quo ante not only secures the rights of the injured parties, but also deters the commission of unfair labor practices by preventing the wrongdoer from gaining advantage from his unlawful conduct. *Mastro Plastics Corp.*, 354 F.2d at 175; *Sheet Metal Workers' Local 355 v. NLRB*, 716 F.2d 1249, 1256 (9th Cir. 1983) (noting that the Act "requires that a transgressor should bear the burden of the consequences stemming from its illegal acts").

Where, as here, the entitlement to backpay of specific claimants has been established in prior Board and Court proceedings, the General Counsel's burden is limited to showing "what would not have been taken from [the employees], if the Company had not contravened the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). Thus, in the backpay proceeding, the General Counsel need only "show the gross amount of backpay due." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). When that is done, "the burden is upon the [party challenging the Board's backpay figures] to establish facts which would negative . . . or . . . mitigate that liability." *Id*. *Accord NLRB v. United Brotherhood of Carpenters & Joiners*, 531 F.2d 424, 426 (9th Cir. 1976); *Florence Printing Co. v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967); *Fugazy Continental Corp.*, 276 NLRB 1334, 1334, 1336 (1985), *enforced*, 817 F.2d 979 (2d Cir. 1987). Any doubts arising with regard to alleged affirmative defenses are to be resolved against the employer who committed the unfair labor practice. *Kawasaki Motors*

Mfg. Corp. v. NLRB, 850 F.2d 524, 531 (9th Cir. 1988); *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

It is settled that the Board's discretion in formulating backpay remedies is "a broad one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 907 (1984); *Achilles Construction Co.*, 290 NLRB 240, 241 (1988), *enforced*, 875 F.2d 308 (2d Cir. 1989). For this reason, "when the Board . . . makes an order of restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the polices of the Act.'" *NLRB v. Fugazy Continental Corp*., 817 F.2d 979, 982 (2d Cir. 1987) (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). *Accord NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953); *NLRB v. Local 3, IBEW*, 730 F.2d 870, 879 (2d Cir. 1984). As the Supreme Court explained, "in fashioning its remedies under [the Act] . . . , the Board draws on a fund of knowledge all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. at 898-99; *Shepard v. NLRB*, 459 U.S. 344, 349 (1983).

Finally, under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's factual findings are conclusive so long as substantial evidence supports them.

Substantial evidence, as the Supreme Court has reiterated, exists when "a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 167 (1999) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). *Accord Ryan Works, Inc. v. NLRB*, 257 F.3d 1, 6 (1st Cir. 2001). The Board's findings are therefore entitled to affirmance if they are reasonable, and a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court might have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. The Board Reasonably Determined that the Union Informed the Company of the Strike's Termination on June 4, 1996, and Computed the Replacements' Backpay Accordingly

As noted, the Regional Director proposed that June 5, 1996, was the date on which to commence the backpay period for replacements based on a June 4, 1996 letter from the Union notifying the Company of the strike's termination. The Company does not dispute that it received the Union's letter. Instead, it claims that because a single employee, glazier Charles Jones, did not return to work or renounce his interest in employment with the Company, the Union's letter was insufficient evidence of the strike's termination. The Board reasonably rejected the Company's argument.

The Union's June 4, 1996 letter was, on its face, sufficient to give the Company notice of termination of the strike. The letter expressly states (GCX 3):[6]

> It is Local 1044's position that by January 1, 1994 its strike against Harding Glass was concluded. By that date, all striking employees (i.e. the glaziers) who were able to work had found other jobs and were not seeking reinstatement with Harding Glass. In addition, by that date Local 1044 had ceased its picketing at Harding Glass.

Given the Union's unambiguous statement that the strike had ceased by as early as January 1994, there can be no merit to the Company's claim (Br. 18-19) that the strike did not end because it never received notice from striking glazier Jones that he had abandoned his right to future employment. The Union's letter specifically rebuts that assertion; it states that "all striking employees (i.e. the glaziers [and necessarily including Jones]) who were able to work had found other jobs and were not seeking reinstatement with [the Company]." (GCX 3.)

Even if the Union had not unequivocally announced the strike's end, the case law does not support the Company's suggestion (Br. 18) that a single employee can lawfully strike in defiance of his exclusive bargaining representative. On the contrary, the Union, as the exclusive bargaining representative of the unit employees, had authority to convey to the Company--on behalf of all employees--notice of the strike's end. *See Plumbers and Pipefitters Local Union No. 520 v.*

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[6] All "GCX" references are to the exhibits of the General Counsel which were admitted into the hearing but not included in the joint appendix. Again, those missing exhibits have been appended to this brief.

NLRB, 955 F.2d 744, 751 (D.C. Cir. 1992) ("[a] union thus may agree that, with respect to unit employees, the right to engage in a work stoppage is waived . . . ") ; *Food Employers Council, Inc.*, 293 NLRB 333, 333 (1989) (same).

Contrary to the Company's contention (Br. 20), *Service Electric Co.*, 281 NLRB 633, 636-37 (1986), does not stand for the proposition that "[a] strike is terminated only when *all* employees unequivocally abandon their statutory right to future employment." (Emphasis supplied.) The issue in that case was whether the employer could rely on the union's notice of termination of a strike in the face of conflicting evidence that the strike was ongoing. However, in that case, the General Counsel conceded that the circumstances of the strike were "unusual from its inception" because it was unaccompanied by "picketing or other publicity;" the employees simply declined to report to work. More importantly, although the union gave the employer notice of the strike's termination, "not one of the striking employees ever sought to return to work." Indeed, the union offered no explanation for the employees' failure to return, even though it had reached an agreement with the employer that the strikers would be entitled to "reemployment automatically on receipt by [the employer] of an unconditional application to return to work, without regard to the presence or absence of vacancies at the time of application." *Id*. at 636. In those specific circumstances, the Board found that

the union's notice to the employer was not sufficient evidence of that strike's unequivocal termination.

Those unusual circumstances are not present in this case. Here, all but one of the striking employees returned to work long before the Union notified the Company of the termination of the strike. And, the Union's June 4 letter even offers an explanation for Jones' failure to return to work; that is, he had obtained other employment.[7] In short, *Service Electric* supplies no basis for reducing the Company's backpay liability to the replacements. *See, for example, Plumbers and Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992).

[7] Contrary to the Company's contention (Br.17), the Union's June 4 letter is more than a "bare assertion" that the strike had ceased. Instead, unlike in *Service Electric*, the Union's letter was preceded by the employees' return to work. Moreover, the compliance officer's statement--that "there seems to be some ambiguity" regarding Jones' intentions about returning to work, presumably to take advantage of recall rights after the strike ended--is no basis for claiming, as the Company does (Br. 17), that there was any ambiguity concerning the termination of the strike.

C. The Board Reasonably Computed the Backpay of Employee Tritone

Tritone returned to work for the Company for a 3 week period beginning in late March and ending in mid-April 1994. The Company contends (Br. 21-22) that, during that period, Tritone was unable to perform a glazier's duties because of a prior injury and should have been accordingly paid at a lower wage rate. As shown below, based on Tritone's prestrike work duties, as well as relevant provisions of the collective-bargaining agreement, the Board reasonably rejected the Company's argument.

The facts are undisputed. Tritone began working for the Company as a glazier in 1988. In April, 1993, as a result of a severe wrist injury, he applied for workers' compensation and was out of work for approximately 8 weeks. In May, Tritone returned to work, and the Company assigned him to a glazier position despite being under medical care for his injury. Tritone continued in that position until the commencement of the strike on October 18, 1993. (A. 601; 532.)

When the strike began, the Company's glaziers, Tritone and Jones, established a picket line in front of the Company's business. On about January 1, 1994, they ceased picketing. On January 31, 1994, the Company wrote to Tritone and offered him employment to a "modified duty (light work)" position. Tritone rejected that offer through his workers' compensation counsel. On March 15, the Company sent Tritone another offer for a "permanent light duty full time position,"

which Tritone accepted. On March 21, the Company changed that offer to one for a "temporary modified duty position" available for 45 days, at which time the Company would evaluate Tritone's ability "to perform [his] regular duties as a glazier."

Tritone still accepted the Company's offer, but when he returned to work on March 28, he saw a posted notice describing the Company's workers' compensation program. The notice stated: "Modified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery." On April 15, before 45 days had passed, however, Tritone voluntarily quit his job with the Company. (A. 601; 532-56)

The Board found (A. 601) that, "[s]ince Tritone was performing glazier work at glazier pay at the time of the strike, he was entitled to reinstatement as a glazier and to glazier pay upon his return." That is the standard formula for determining backpay unless the employer shows that changed circumstances warrant use of a different formula. *See Transport Serv. Co.*, 314 NLRB 458, 459 (1994) (former strikers were entitled to reinstatement to former positions absent a showing of "postdecision changes in circumstances"). *Accord NLRB v. Rockwood & Co.*, 834 F.2d 837, 841-42 (9th Cir. 1987).

The Company failed to show changed circumstances here. As the Board noted (A. 601): Although "Tritone's work during the 2-week period was not the

same as that performed prior to the strike . . ., [t]he fact that [Tritone's] work, upon return from the strike, was different from the work before the strike does not mean that his work upon return was not *glazier* work." (A. 601 (emphasis supplied).) The Board found (A. 601), that, after the strike, Tritone performed the glazier work of "measuring store fronts and doors for possible future glass replacement." The Company does not dispute that these were glaziers' duties. In addition, the Board found that Tritone picked up cars and brought them back to the shop to have the auto glass employees work on them, that he did this work during the backpay period, and that he and other glaziers performed this work previously. Thus, substantial evidence supports the Board's finding that Tritone performed glazier's work upon his return from the strike.

The provisions of the parties' collective-bargaining agreement also support the Board's finding that Tritone was entitled to backpay at the glazier's rate. Article XIV of that agreement provided that "all employers of Glaziers Local 1044 must have Workers Compensation Insurance . . . to cover all members employed by them." (GCX 4.) The Company's posted notice, that Tritone read, asserted that its workers' compensation program "provide[d] full wages for an injured employee during recovery" for the 45 days that the employee was filling a "temporary modified duty position." (GCX 12.) The Board reasonably found (A. 602) that "the Company's workers' compensation program was a term and condition of

employment [because] [i]t set forth the Company's policy regarding employees on modified light duty." Thus, the Company could not lawfully modify that program without bargaining to impasse with the Union, which it did not do, given the findings in the underlying unfair labor practice case that it did not bargain to impasse on any issue.

Further, the Company points to no provision in the expired collective-bargaining agreement that permitted it to pay less than the full glazier wage rate when an employee served on light duty. On the contrary, Joseph Guiliano, the Union's business manager, agreed that the Union never had an agreement with the Company whereby the Company "could pay the glaziers less than full contract rate while they were on any kind of light duty." (A. 515.) As the Board noted (A. 602), its order, as enforced by this Court, requires restoration of the *status quo ante*. Therefore, it follows that the Company was obligated to pay Tritone at the glazier's "full contract rate" of $22.05 per hour.

D. The Board Acted Within Its Discretion in Striking the Company's Affirmative Defenses and in Granting Partial Summary Judgment

As noted above (pp. 7-8), the Board in its 2002 Decision and Order, struck the majority of the Company's general denials as insufficient under the Board's rules requiring specific answers to the compliance specification and found several of the Company's affirmative defenses legally insufficient to merit a hearing. Before the Court, the Company makes three distinct attacks against the Board's

rulings. First, it claims that the Board exceeded its discretion in *sua sponte* granting summary judgment on portions of the Regional Director's amended compliance specification that the Regional Director claimed would remain litigable in a subsequent evidentiary hearing. Second, it contends that the Board abused its discretion by granting the Regional Director's explicit request for summary judgment, as to the status of employees David Elworthy and Christopher Pelletier as glassworkers entitled to that pay rate. Finally, it argues that the Board erred in striking the Company's affirmative defense regarding possible mitigation of liability to the Union's funds. These arguments--which are all meritless--are addressed in turn below.

1. The Board did not exceed its discretion in *sua sponte* granting summary judgment against the Company for its insufficient responses to the compliance specification

In her motion to strike portions of the Company's insufficient answer, the Regional Director enumerated several paragraphs of the compliance specification that she believed were open to further litigation. The Board's opinion, however, specifically limited litigation to three areas: Paragraph 11 of the Compliance Specification regarding the date the strike ended, "interim earnings and expenses of each of the employees," and "the status of James Tritone." (A. 109-10.) The Company argues in its brief that "it was error for the Board to strike those defenses [the Regional Director] specifically stated were reserved for litigation." (Br. 14.)

As shown below, however, the Company's challenge must fail because it never presented that argument directly to the Board and thus cannot present it to the Court. And, in any event, the Board reasonably struck the Company's answers as insufficient despite the Regional Director's suggested limitation.

Initially, it is clear that the Company never availed itself of several opportunities to raise its complaint about any of the Board's *sua sponte* rulings directly with the Board. While the Company may have been taken aback by the Board's rulings on certain allegations that the Regional Director said were left open for further litigation, the Company never filed a motion for reconsideration of those *sua sponte* determinations made by the Board.[8] Failure to file that motion for reconsideration – thereby bringing the Company's concerns to the Board's attention – precludes the Court's consideration of the issue under Section 10(e) of the Act. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court . . . ."); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) ("the Court of Appeals lacks jurisdiction to review . . . objections" that were not raised to the Board, even though the Board decided the issue *sua sponte*); *International*

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[8] Instead, it filed an unfounded petition for review of the Board's decision, which this Court properly dismissed. Even after the matter was returned to the Board pursuant to the Court's remand, the Company did not file a motion with the Board for modification of the 2002 Supplemental Decision and Order. Rather, the Company remained silent.

Ladies Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 281 n.3 (1975) (same).

Concededly, the Company complained that the Board's *sua sponte* determinations denied it due process when the Regional Director filed a motion in limine seeking to limit the issues at the hearing to those explicitly remanded. (A.135.) Yet, even after the administrative law judge rejected the Company's argument (A.138), the Company never sought a special appeal to the Board of the judge's decision. Nor did it appeal the judge's ruling when it filed exceptions to the judge's recommended decision, even though the Board's rules expressly provide that a party adversely affected by a ruling on a motion has the opportunity to present it to the Board at that time. *See* 29 C.F.R. § 102.26 (providing that rulings "by the administrative law judge on motions [by him] . . . shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions . . . []"). In these circumstances, where a party failed to utilize the many opportunities provided to it to raise directly with the Board a challenge to a Board ruling--here depriving the Board of the

opportunity to reconsider its *sua sponte* decisions--the courts should not hear its complaint.[9]

In any event, even if the Company had preserved its argument that the Board should not have ignored the Regional Director's list of areas reserved for hearing, the Board reasonably decided *sua sponte* that the Company's answers to those allegations of the compliance specification were insufficient. After all, it is the Board that has ultimate responsibility for ensuring that its limited resources are used wisely. *See Teledyne Economic Development v. NLRB*, 108 F.3d 56, 59 (4th Cir. 1997) (recognizing that the Board has "inherent discretion to allocate its limited resources efficiently") (internal citation omitted). And, in a compliance proceeding, the Regional Director acts principally as an agent of the Board, charged with investigating the circumstances that determine compliance with the Board's order. *See* Section 102.53 of the Board's Rules and Regulations (providing that a charging party dissatisfied with the Regional Director's compliance determination may request review by the Board of that determination).

Here, given the deficiencies of the Company's answers, the Board, *sua sponte*, could reasonably find that, even in the absence of the Regional Director's

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[9] *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *E.C. Waste, Inc. v. NLRB,* 359 F.3d 36, 41 (1st Cir. 2004) ("When a party fails to raise particular issues before the Board, it ordinarily forfeits any right to challenge those findings on a petition for judicial review."); *accord McGaw of P.R., Inc. v.*

motion for summary judgment, some of the Company's answers did not meet the specificity requirements of Sections 102.56(b) and (c) of the Board's Rules and Regulations and warrant an evidentiary hearing. Those rules provide that:

> The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, *a general denial shall not suffice*. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

29 C.F.R. § 102.56(b) (emphasis added). If a respondent fails to file a specific answer under these rules, the allegations "shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation." 29 C.F.R. § 102.56(c).

The Company's answers were plainly deficient, and the Board reasonably struck them for insufficient specificity or concluded that they had no legal merit. First, although the Company contends (Br. 10) that it should have been entitled to

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NLRB, 135 F.3d 1, 11 (1st Cir. 1997); *NLRB v. Horizon Serv.*, 761 F.2d 22, 26 (1st Cir. 1985).

litigate whether some of the employees were "eligible for back pay because they are striker replacements," it never raised any issue as to the identity of the striker replacements, but only when their backpay period commenced. The parties agreed that it commenced when the strike ended and, as shown, the Company was permitted to litigate when that occurred. (A. 364-65, 466-67.)

Similarly, the Board properly denied the Company the right to dispute (Br. 12) that the compliance specification correctly "set forth the dates of nine employees' backpay periods." As noted (A. 108), the Company's general denial to the compliance specification was insufficient. Rather, the Company was obligated to allege alternate dates for the running of the backpay period and the premises for those alternate allegations. *See* Sec. 102.56(b) of the Board's Rules and Regulations. The Company did not meet its burden of pleading with such specificity. (A.59-73)

Likewise, the Company cannot complain because the Board did not permit the Company to litigate "issues surrounding the employees' strike, [and] . . . subsequent bargaining." As the Regional Director noted in her motion in limine (A. 437, 439), besides contesting the dates on which the strike began and ended – which the Company was permitted to litigate at the hearing – its only other claim was that the parties had bargained to impasse. However, under Board law, the Company could not bargain to impasse with the Union in the face of unremedied

unfair labor practices. *See Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133, 138 (D.C. Cir. 1999) (citing cases). Moreover, the Board, with this Court's approval, had previously determined that the parties did not bargain to impasse, at least as of the time of that hearing. (D&O 985.)

As to the other two issues that the Company claims the Board incorrectly prevented it from litigating – its claim that it made no changes in the employees' terms and conditions of employment, and that it restored the *status quo ante* – the first was resolved against the Company in the underlying unfair labor practice proceeding. As to the second, the Company made no specific offer of proof claiming that it had already restored the terms and conditions of employment that warranted a hearing. In sum, even if the Company had preserved its challenge to the Board's decision to strike areas the Regional Director felt were reserved for hearing, it would have no merit.

2. The Board reasonably granted the Regional Director's motion for summary judgment as to the alleged status of glassworkers Elworthy and Pelletier

In her compliance specification, the Regional Director specifically alleged that replacement workers David Elworthy and Christopher Pelletier worked as glassworkers during the backpay period, and computed the two employees' backpay accordingly. In its answer, the Company, without elaboration, denied that the two employees were glassworkers. (A. 54, 55-56.) On the motion to strike, the

Board reasonably concluded that, without more, the Company's general denial that Elworthy and Pelletier were glassworkers was not a specific enough answer to the Regional Director's allegation to meet the requirements of Section 102.56(b) of the Board's Rules and Regulations. For the reasons explained below, the Court should affirm that decision.

As the Board found, the Company's general denial that Elworthy and Pelletier were glassworkers was insufficient because, if the two employees were not glassworkers, their actual "job classifications are obviously well within the [Company's] knowledge." Indeed, although the Company has never contested that the two employees were in one of the two units, it has not--to this date, even in its brief to the Court--made a "counterassertion . . . as to what Elworthy's and Pelletier's job classifications *in fact were,* if not glassworkers." (A. 108 (emphsis in original).) Nor, as the Board reasonably found (A. 108), has the Company ever asserted "*the basis* for the [Company's] disagreement with the job classifications alleged in the specification, much less [given] even a detailed statement of [its] position as to the applicable premises on which the determination of the job classifications in question *should* be based." In view of the Company's failure to specifically answer the Regional Director's allegation that Elworthy and Pelletier were glassworkers, the Board reasonably granted her motion for summary judgment concerning their status.

3. The Board reasonably refused to reduce the Company's liability to the Union's funds by the cost of alternative plans the Company unilaterally imposed upon the employees

As noted, the Board also granted the Regional Director's motion to strike the Company's affirmative defenses. Before this Court, the Company takes issue with the Board's decision to strike the Company's claim that it was entitled to an offset against its liability to the Union's funds for contributions it made to alternative plans that it unilaterally established for the employees.[10] The Board reasonably rejected the Company's argument.

As the Board noted (A. 109), its case law is clear. "Employees have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), *enforcement denied in relevant part*, 107 F.3d 882 (D.C. Cir. 1997). That rule simply recognizes, as the Board explained, that "the wrongdoing employer should not benefit by having at its disposal money which rightfully belonged to the contractual funds." (A. 109.) And, as the Ninth Circuit observed

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[10] The Company also contests the Board's decision not to permit it to raise "unconscionable delay" as a defense to the specification. Since the Company seeks, in effect, equitable relief from this Court on the same basis, we address that argument in the next and final section of this brief. In any event, the facts concerning the time it has taken to resolve this case are matters of public record and did not require an evidentiary hearing to further develop. Thus, the Board properly disallowed an evidentiary hearing on that affirmative defense.

in upholding the Board's rule:

> [A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits. The company is merely required to repay what it has unlawfully withheld . . . [I]t was the company that unlawfully chose to incur the additional expense of a private insurance program.

Stone Boat Yard v. NLRB, 715 F.2d 441, 446 (9th Cir. 1983) (citations omitted). *See also Banknote Corp. of America*, 327 NLRB 625, 625 (1999). Accordingly, applying its settled rule that such offsets are immaterial to determining the reimbursement due the Union's funds, the Board appropriately struck the Company's asserted affirmative defense. *See Scepter, Inc. v. NLRB*, 448 F.3d 388, 390-92 (D.C. Cir. 2006) (distinguishing its earlier decision in *Grondorf* and enforcing backpay award to union funds without offset); *NLRB v. Coca-Cola Bottling Co. of Buffalo*, 191 F.3d 316, 324 (2d Cir. 1999) (affirming backpay award to union's funds without offset); *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1984) (same).

Nonetheless, citing the D.C. Circuit's decision in *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882 (D.C. Cir. 1997), the Company contends (Br. 14) that the funds are not entitled to a "windfall" that would benefit the funds and not the employees. To be sure, the court, in *Grondorf*, did direct the Board to give the employer there an opportunity to show that payments to the funds could result in a windfall that might not benefit the employees. Here, however, other than noting

that the employees received some health insurance, the Company limited its explanation of why it should not have to pay to the health, pension, annuity, and apprentice funds to this: "Such payment would fail to benefit the alleged discriminatees, would be unduly harsh on [the Company], result in a windfall to the union funds, and would be punitive and, as such, inconsistent with the remedial purpose of the Act." (A. 49.) In short, the Company failed to offer any basis for its "windfall" claim in its answer or assert the specific amounts it was seeking as offset. Thus, even under the D.C. Circuit's view of law, the Company's vague affirmative defense--like the rest of its answer--would not entitle it to litigate whether alternative contributions should mitigate its liability to the funds.

Similarly, *Manhattan Eye, Ear & Throat Hospital v. NLRB*, 942 F.2d 151, 160 (2d Cir. 1991) does not advance the Company's claim that it was entitled to litigate a poorly pleaded answer to a compliance specification. Although the court in that case did permit the employer to take offsets for its contributions to an alternative plan that it had established, it did so in circumstances where the employer had escrowed more than $2,000,000 for payment to the funds and could demonstrate the extent to which the employees did not have a future interest in the funds. As shown, the Company has never pled any facts as remotely specific as those proved in *Manhattan Eye, Ear & Throat.*

E. The Board Reasonably Found that the Company Was Not Entitled to Relief from Its Backpay Obligations Because of Any Delay in Resolving this Case

The Supreme Court has made clear that any Board delay in the course of backpay proceedings is not a basis for abridging the relief owed the victims of unfair labor practices. *NLRB v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 724-25 (1984) (per curiam); *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). This is so because the "Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Rutter-Rex Mfg. Co.*, 396 U.S. at 265. Indeed, as the Seventh Circuit has recognized, any delay by the Board simply means that the employer "had that much more time to enjoy the use of the money that it should have given its workers earlier." *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1141 (7th Cir. 1992). As for any accrued interest the Company complains about, that "merely transfers the fund built up by the Board's delays to its rightful owners." *Id.*

Although the Company asserts (Br. 22) that the order is punitive, that claim is baseless. The Board's order in no way imposes extra backpay liability to punish the Company for egregious unfair labor practices. Rather, the order only restores the *status quo ante*, giving employees full backpay for the reductions in wages and

benefits found unlawful by this Court. Mere delay does not justify depriving employees of relief from an employer's unfair labor practices against them. [11]

Moreover, the Company always had the means to conclude this case expeditiously. After all, it was in possession of the records necessary to compute *gross* backpay, as well as the information necessary to compute employees' *net* backpay (because the affected employees' interim employment was with the Company). The Company could even have carried out the interest calculation because that formula is a matter of public record. *See New Horizons for the Retarded*, 283 NLRB 1173, 1173-74 (1987). In short, the Company could have ended this matter shortly after it was ever launched by calculating for itself its backpay obligation and making the requisite payments after the Court issued its mandate in the underlying unfair labor practice proceeding. *See Preterm, Inc.*, 273 NLRB 683, 685 (1984) (rejecting "inexcusable delay" contention because "[n]o evidence was presented to reveal that the [employer], on its own, could not have made all the computations and determinations necessary for compliance with such order[]"), *enforced,* 784 F.2d 426 (1st Cir. 1986). In these circumstances, it can hardly be said that the Board's delay in computing backpay has resulted in undue

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[11] *See also Bufco Corp. v. NLRB*, 147 F.3d 964, 967-68 (D.C. Cir. 1998) (enforcing backpay award despite employer's challenge to the award of interest for the full backpay period and the case was 16 years old); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1059 (D.C. Cir. 1989) (enforcing Board's backpay order,

prejudice to the Company. *See NLRB v. Taylor Mach. Prods.*, 136 F.3d 507, 513-14 (6th Cir. 1998) (noting that a lack of prejudice militates against finding unreasonable delay); *NLRB v. Hub Plastics*, 52 F.3d 608, 614 (6th Cir. 1995) (same).

Finally, the Court should reject the Company's alarmist claim (Br. 22) that compliance with the order will put the Company out of business when it is possible that it could work out a payment schedule with the Regional Office. *See NLRB Casehandling Manual, Vol. III*, § 10592.12 ("The Regional Director may accept backpay in installment payments when satisfied that the respondent's financial position would be jeopardized by full immediate payment."). In any event, as the D.C. Circuit has observed: "We are aware of no authority which would exalt the [c]ompany's alleged precarious financial condition over the employees' right to an award of back pay. Manifestly, the remedial provisions of the Act should prevail over this claim, especially when the [c]ompany has enjoyed the fruits of its violation." *NLRB v. R. J. Smith Construc. Co., Inc.*, 545 F.2d 187, 193 (D.C. Cir. 1976).

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notwithstanding that more than 6 years had elapsed between time of court's remand and Board's issuance of supplemental order).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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